Supreme Court, U.S.
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No. ____

In the Supreme Court of the United States

Amy G. and G. G.,
Petitioners,
v.
M. W.,
Respondent.

On Petition for a Writ of Certiorari to the California Court of Appeal Second District, Division Three

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioners, a husband and wife raising the husband's extramarital child, seek legal recognition of the wife as the child's mother. In refusing to extend presumed-father laws to a maternity contest between the wife and the birth mother, the California court of appeal relied on *Tuan Anh Nguyen v. I.N.S.*, 533 U.S. 53, 54 (U.S., 2001) to find no equal-protection violation. California's Supreme Court denied review.

California's substantive parentage presumptions (the presumed-father statutes, Cal. Fam. Code §§7540, 7541, 7611 and 7612) are driven, not by biological paternity, but by the state's interest in the welfare of the child and the integrity of the family. *Elisa B. v. Superior Court*, 37 Cal.4th 108 (Cal., 2005). This Court upheld application of California's presumed-father laws over the liberty-interest claims of a biological father and daughter in *Michael H. v. Gerald D.*, 491 U.S. 110 (U.S., 1989).

Under what, if any, circumstances do the U.S. Constitution's Fourteenth Amendment due-process, equal-protection, and privacy guarantees permit different treatment of men and women in parentage and child custody cases? This question includes three narrower subsidiary questions:

1. Do Fourteenth Amendment equal-protection, due-process and privacy guarantees require a state to apply its presumed-father statutes to maternity cases?
2. Do Fourteenth Amendment equal-protection, due-process and privacy guarantees require a state to give the same protection to marital families raising a husband's extramarital child, that it gives marital families raising a wife's extramarital child?
3. Do Fourteenth Amendment equal-protection, due-process and privacy guarantees require a state to give a husband's extramarital child, and a wife's extramarital child the same marital-family protections?

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OPINION BELOW

The opinion of the California Court of Appeals, Second District, Division Three is reported at 142 Cal.App.4th 1.

JURISDICTION

The opinion of the court of appeals was entered August 17, 2006. The California Supreme Court denied a timely Petition for Review on November 29, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The equal-protection clause of the Fourteenth Amendment to the Constitution provides in relevant part "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The relevant provisions of the California Family Code are reproduced at App. D, *infra,* at page *1d.*

STATEMENT OF THE CASE[1]

Amy G. and G.G. are a married couple, raising G.G.'s extramarital child, Nathan, as a child of their marriage with their two older children. When Nathan was six months old,

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[1] Except where noted by record citations, this factual summary tracks the Court of Appeals account of the facts.

Kim (M.W.), his birth mother, sought emergency orders for child custody and child support in a parentage action. [Ex.109-127]

At the time of Nathan's conception and birth, Kim was married, but separated from her husband. When she became pregnant, Kim left California for Virginia, where she remained to conceal her pregnancy and her biological relationship to the baby from all of her family, friends, fellow church members and business associates. [Ex. 16-17, 18, 49, 114, 154, 185, 206, 1081]

> The parties disagree as to their intent and as to the circumstances of Nathan's conception and birth. Father asserts Kim offered to bear a child who would be raised as a child of his marriage to Amy. Kim contends her relationship with father was romantic, the pregnancy was unplanned, and that she expected they would raise Nathan jointly.
>
> *Amy G. v. M.W.*, 142 Cal.App.4th 1, 5 (Cal.App., 2006)

When Nathan was 29-days-old, Kim delivered him to his father; together with all of his clothing, birth and hospital records, and personal effects. [Ex. 60, 147,155,1082] Without counsel, she signed a agreement drafted by a Virginia lawyer retained by G.G., consenting to a stepparent adoption by Amy. She contends she did not understand what she was signing and felt pressured to do so. The agreement did not comply with California law governing stepparent adoptions. Amy and G.G. did not initiate a stepparent adoption before Kim brought her parentage action.

The family court ordered a child custody evaluation, and limited Kim to monitored visitation with Nathan, based on evidence of her inability to care for him safely. The child custody evaluator found that Amy is Nathan's psychological mother, and recommended that any visits between Nathan and Kim be monitored for Nathan's safety, and for abduction prevention. [Ex. 1-101, 110, 1185]

The family court dismissed Amy's separate maternity action for lack of standing, and denied G.G.'s motion to join Amy as a party to the action. Amy and G.G. contended that they were entitled to plead and prove that Amy should be recognized as Nathan's mother under California's presumed-father laws (Fam. Code §§ 7540-41, 7611-12, 7635(b) and 7650).

California's presumed-father laws have been substantially amended and more-extensively interpreted since this Court considered them in *Michael H. v. Gerald D.*, 491 U.S. 110 (U.S. 1989).

Under California law, if Amy was a husband, rather than a wife, she would be a presumed parent. If the trial court concluded that Kim's 29 days of caring for Nathan in hiding constituted receiving him into her home and holding him out as her natural child under Cal. Fam. Code §7611(d), Kim would also have presumed-mother status and standing. See *Lisa I. v. Super. Ct. (Phillip V.),* 133 Cal.App.4th 605 (Cal. 2005).

If Kim had standing, then the family court would have balanced the competing women's claims under the "best interests" standards set forth by the California Supreme Court in *In re Jesusa V.*, 32 Cal.4th 588 (Cal. 2004). See also *Craig L. v. Sandy S.,* 125 Cal.App.4th 36 (Cal. 2004), holding, *inter alia*, that Fam. Code §7541's genetic testing provision doesn't make biology dispositive of parenthood where biological parent has §7611(d) standing and acts in a timely fashion, because the husband gets 'a second bite at the apple' under Fam. Code §§7611-12.

Amy and Kim also wanted to plead and prove that Kim is estopped from contesting Amy's legal status as Nathan's mother.

Amy and G.G. sought appellate review by writ and appeal. California's court of appeal stayed the trial court proceedings, and consolidated the writ and appeal.

The court of appeal refused to apply the presumed-father laws to Amy. The opinion characterizes California

law as applying the presumed-father laws to women only in limited situations,

> In limited circumstances, the presumptions of paternity listed in section 7611 have been interpreted to apply to women. [Citations]
>
> *Amy G. v. M.W.*, supra, 142 Cal.App.4th12

The court of appeals held that gender-neutral application of the presumed-father statutes is not "practicable" here because of the biological differences between men and women.

The court cited this Court's decision in *Tuan Anh Nguyen v. I.N.S.*, 533 U.S. 53, 54 (U.S. 2001) in support of its holding that federal constitutional equal-protection guarantees were not violated because Amy is not similarly-situated to a lesbian mother, nor to a husband.

Petitioners' timely petition for review by the California Supreme Court was denied on November 29, 2006. The California Supreme Court did not depublish the court of appeal opinion.

REASONS FOR GRANTING THE PETITION

California's court of appeals has decided an important question of law in a way that conflicts with this Court's holdings in *Tuan Anh Nguyen v. I.N.S.*, supra, 533 U.S. 53, 54; *Michael H. v. Gerald D.*, supra, 491 U.S. 110; and *Troxel v. Granville*, 530 U.S. 57 (U.S. 2000).

The California decision conflicts with *Nguyen* because it fails to consider the purposes of the statutory scheme when determining which groups of putative parents are similarly-situated. It conflicts with *Michael H.* because it fails to give any weight to protection of the marital family. It conflicts with *Troxel* because it fails to recognize the heightened standard governing parental-rights cases, and the importance of minimal state interference into family life.

This case is important for the same reasons that those cases have continued importance, and are regularly relied-

upon by state courts and legislatures. *Amy G.* provides an opportunity for this Court to harmonize those cases and address the standard governing the "fit" between gender classification and the purposes of a state's statutory scheme in family law cases determining who possesses fundamentally protected rights. State courts need that guidance from this Court.

Who is a parent? What is a family? What marital and family units are entitled to state protection? May state law use gender to answer those questions?

When state law answers those questions, the most fundamental personal relationships and liberty interests are at stake. Must states use a higher standard of care when using gender-based distinctions in those cases?

In California, those questions are often answered by applying the presumed-father statutes, a set of substantive laws which further the state's interests in marital integrity and privacy, stable family ties during childhood, and protection of children from the stigma of illegitimacy. *In re Jesusa V.*, supra, 32 Cal.4th 588.

Under the presumed-father statutes, biological parenthood is either relevant but not determinative (Ibid.) or entirely irrelevant (*Dawn D. v. Super. Ct. (Jerry K.)* 17 Cal.4th 932 (Cal. 1998), U.S. cert. denied 525 U.S. 1055; *Elisa B. v. Superior Court*, 37 Cal.4th 108 (Cal. 2005)).

A man who is married to a child's mother (Cal. Fam. Code §7540, §7611(a)), or who receives a child into his home and holds the child out as his natural child (Fam. Code §7611(d)) attains presumed-father status under California law. "Natural" does not mean "biological" under the parentage sections of the Family Code. One may hold a child out as one's natural child under §7611(d) without claiming a biological tie to the child. *Elisa B. v. Super. Ct. (Emily B.)*,

supra, 37 Cal.4th 120; *In re Nicholas H.* 28 Cal.4th 56 (Cal. 2002).[2]

"Parties who seek to defend gender-based government action must demonstrate an "exceedingly persuasive justification" for that action." *U.S. v. Virginia,* 518 U.S. 515, 531 (U.S. 1996). How persuasive must that justification be when a state adopts different gender-based standards for decisions about who holds and exercises the fundamental liberty interest of parenthood? Must the justification be substantially-related to each of the state and constitutionally-protected individual interests?

A. *Permissible Role of Gender in State Parentage Establishment Law:*

This case provides an opportunity for this Court to articulate the standards governing gender-based equal-protection, due-process, and family-privacy claims in cases where the law decides who it will recognize as a parent for purposes of deciding who will raise and support the child.

The California court misread, misconstrued and misapplied *Tuan Anh Nguyen v. I.N.S.*, supra, 533 U.S. 53, 54. California failed to test the trait (gestational bonding) that it used to distinguish between classes of putative parents based on gender against the long-established purposes of California's presumed-father statutes (marital integrity and privacy, stable family ties during childhood, and protection of children from the stigma of illegitimacy).

Nguyen holds that for a gender-based classification to withstand equal-protection scrutiny, it must be established at least that the challenged classification serves important

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[2] But the *Amy G.* court held that "natural" *does* mean "biological" in cases involving the competing claims of a child's birth mother, and a woman who receives the child into her home and raises him as her own, even though it has a different meaning in other fact-patterns. *Amy G. v. M.W.*, supra, 142 Cal.App.4th 15.

governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives (Id. 60-61).

In *Nguyen* the purpose of the federal immigration statute was to determine the existence of a biological tie between a person claiming citizenship and a U.S. citizen that would give rise to a real-world opportunity to form a relationship with the child. Hence the biological differences between men and women with respect to their knowledge that the child had been born provided substantial basis for treating men and women differently.

The interests at stake in *Nguyen* were not the fundamental liberty-interests of parents and children to protection and continuity in their family relationships, nor the fundamental liberty-interests of marital families in marital integrity and privacy. Congress was unconcerned with an individual child's best interests. In *Nguyen*, the interest at stake was Congressional power to regulate immigration and naturalization. The "child" was an adult felon attempting to avoid deportation by asserting U.S. citizenship, not a minor child whose upbringing turned on who established parentage.

In *Caban v. Mohammed*, 441 U.S. 380, 389 (U.S.1979), this Court voided on equal-protection grounds a law New York claimed was justified by the "gestational bonding" rationale used decades later in *Amy G.* "Even if unwed mothers as a class were closer than unwed fathers to their newborn infants," this Court held, "this generalization concerning parent-child relations would become less acceptable as a basis for legislative distinctions as the age of the child increased." Id. at 389. What weight does that precedent have today?

New York adoption law simply could not presume that women have a meaningful relationship with their offspring but men do not. This Court rejected the claim that the New York statute's broad, gender-based distinction was required by any universal difference between maternal and paternal

relations at every phase of a child's development. This Court held that the statutory, inflexible gender-based classification was not fair and reasonable, and did not rest upon some ground of difference having a fair and substantial relation to the object of the legislation. Id at 391.

Do the principles of *Caban*, rejecting inflexible gender-based distinctions for the termination of parental rights, carry over to cases establishing whether men and women possess parental status?

California's Supreme Court has held that the state's presumed-father statutes embody a position of biological relevance: biology is not the whole story or even the most important part of the story. *In re Jesusa V.*, supra, 32 Cal.4th 616 (Cal. 2002).

In re Karen C., 101 Cal.App.4th 932, 936 (Cal. 2002), applying the presumed-father statutes to a maternity case, summarizes the policies that numerous California appellate decisions have articulated, "The judicial determination of paternity is thus a mixture of a search for genetic truth and the implementation of the strong public policies favoring marriage and family stability, and disfavoring labels of illegitimacy. A judgment establishing paternity can, therefore, be a decretal fiction."

Under the presumed-father statutes, courts make individualized determinations of the child's best interests on a case-by-case basis under Cal. Fam. Code §7612 to determine whether biological parenthood should rebut presumed fatherhood, and which of two presumed fathers will be recognized in law as the child's parent. *In re Jesusa V.*, supra, 32 Cal.4th 588, 604-609, 615; *Craig L. v. Sandy S.*, supra, 125 Cal.App.4th 36 (even where biological parent with standing rebuts §7540 presumption under §7541 through genetic testing, husband and wife may resort to the §§7611-12 presumptions, and court must engage in individualized balancing).

Members of this Court have articulated somewhat different standards for the heightened equal-protection

scrutiny required to test the validity of state action that treats mothers and fathers as different classes. But they have generally agreed that there must be a strong relationship between the purposes of the statute, and the trait that distinguishes men from women.

Even where sex-based stereotypes underlying legislation may hold true for many, even most, individuals, this Court consistently rejects official actions that classify unnecessarily and overbroadly by gender when more accurate and impartial functional lines can be drawn. *Miller v. Albright* 523 U.S. 420 (U.S.1998).

Where the interests involved are those that this Court has traditionally recognized as fundamental, does there need to be a closer "fit" between the sex-based traits defining the classes, and the purposes of the statutory scheme?

In *Amy G. v. M.W.*, supra, 142 Cal.App.4th 1, a state appellate court has carved out an irrebuttable "pregnancy presumption" governing maternity cases that substitutes for individualized fact-finding and balancing when two women compete for mutually-exclusive status as mothers. California uses individualized determinations to resolve disputes between presumed fathers.

The California Court held that Amy G. is not similarly situated to non-biological presumed fathers (men who have married the mother or received the child into their homes as their natural child) or to non-biological lesbian mothers, simply because she is competing against a birth mother.

In the court of appeal's eyes, gestational bonding always trumps not only bonds created through daily nurture, but also trumps the state's interests in the permanence and stability of children's developmentally significant bonds, marital privacy and integrity, and avoiding the social stigma of illegitimacy.

While pregnancy undoubtedly gives birth mothers an initial opportunity to develop a relationship to the child that promotes the growth of stable, developmentally-strong bonds with the child, the facts of *Amy G.* show that is not

always the case, and the existence of those bonds between the child and one of the putative parents does not fully satisfy the purposes of the statutory scheme.

The irrebuttable pregnancy presumption bars courts hearing maternity cases from considering whether gestational bonding led to a meaningful mother-child relationship, whether the child has a stronger mother-child relationship with the woman married to the father, the impact of recognition of the birth mother on marital integrity and privacy, the impact of the stigma on the child, and the child's best interests.

May California conclude that it is enough that many or even most birth mothers would prevail under those factors? Application of the pregnancy presumption requires conferring legal status on birth mothers who have abandoned their children, as well as those who have raised them.

This case presents the constitutional issues squarely, without messy, contested facts. Appellate review arose from rulings on pretrial motions based upon stipulated facts. [Ex. 110, 1185] The rulings on joinder and the motion to quash Amy's action excluded Amy from the litigation. No trial has taken place.

In *Troxel*, this Court held that the right to raise one's children is among the most fundamental liberty interests a person can possess. It follows that when state law governs who holds that liberty interest, it must do so in a fashion that meaningfully honors the Constitution's due-process, equal-protection, and family-privacy guarantees.

B. *Protection of the Marital Family:*

This case provides an opportunity for this Court to articulate the standards governing gender-based equal-protection, due-process, and family-privacy claims in cases where the law decides which marriages are entitled to state protection, and which children and marital families are to be protected from the social stigma of illegitimacy.

May states treat men and women differently under parentage statutes driven, not by biological paternity, but by the state's interest in the welfare of the child and the integrity of the family?

In answering that question, this Court can clarity the standards that govern gender-based due-process, equal-protection, and family-privacy claims in a broad range family law cases where the law decides who will raise a child.

In a sense, this is a true "defense of marriage" case, although the term has been popularized for other purposes. This case is really about defending marriage[3] – one of the long-recognized purposes of the governing statutes is to protect marital families, and the child's right to the protection of the marital family.

California applies the presumed-father statutes to cases in which married couples are raising the wife's extramarital child, and to same-sex motherhood cases. But California discriminates against married couples raising the husband's extramarital child, denying them, and their children, the same protections.

Does the Constitution permit California to protect some marriages, but not others, depending solely on the gender of the parent who had an extramarital child?

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[3] California law gives domestic partnerships and the children of domestic partners the same protections with respect to parentage, including application of the presumed-father laws, that it gives to marital families. Cal. Fam. Code §297.5(d).

In celebrating the primacy of gestational bonding, the California court failed to extend the same weight that it affords to a wife's marital family to the father's marital family – thereby denying the child the protection of the marital family.

California's presumed-father statutes embody a long-established, strong public policy in favor of the protection of marital families.

> The conclusive presumption is actually a substantive rule of law based upon a determination by the Legislature as a matter of overriding social policy, that given a certain relationship between the husband and wife, the husband is to be held responsible for the child, and that the integrity of the family unit should not be impugned. [Citations] In addition, the rule protects the innocent child from the social stigma of illegitimacy. [Citations] Although the Uniform Parentage Act, adopted in California in 1975 (Civ. Code, § 7000 et seq.), attempts to remove the legal effects of illegitimacy, the Legislature nevertheless retained the conclusive presumption of Evidence Code section 621, in contrast to the other presumptions under the act, which are rebuttable. [Citations]
>
> *Vincent B. v. Joan R.*, 126 Cal.App.3d 619, 623 (Cal. 1981)

This Court observed in *Michael H. v. Gerald D.*, supra, 491 U.S. 110, 120, that the "presumption not only expresses the State's substantive policy but also furthers it, excluding inquiries into the child's paternity that would be destructive of family integrity and privacy."

The *Amy G.* decision fails to factor family integrity and privacy into the equation, when it refuses to extend the marital presumptions to women. Unlike Victoria (the child in *Michael H.* who spent substantial time living in a non-marital family unit with her mother and biological father), Nathan has not spent a significant period of time living with

Kim in a family setting. This case does not involve competition between a traditional and a nontraditional family form.

Similarly, the *Amy G.* court failed to consider the policy of protecting children from the stigma of illegitimacy. Nathan is approaching school age. Because Nathan has two older siblings, and his parents have been married for many years, Nathan will inevitably suffer from this stigma – as will his parents and siblings. If Kim starts turning up at church and school events as Nathan's mother, Nathan's community will be well-aware of his status as a child conceived outside of his parents' marriage.

Do children like Nathan have an equal-protection right to the same protections of the marital family that California gives a wife's extramarital child, or can the state pick and choose based upon generalities about gestational bonding?

In a series of landmark cases that inspired development of the first Uniform Parentage Act and the abolition of bastardy law, this Court acted to protect children's equal-protection rights with respect to parentage. *Levy v. Louisiana*, 391 U.S. 6 (1968); *Weber v. Aetna Casualty & Surety Company*, 406 U.S. 16 (U.S. 1972); *Gomez v. Perez,* 409 U.S. 53 (U.S. 1973). Does California's birth-mother exception to the presumed-father laws similarly violate children's equal-protection rights?

C. *"Pregnancy Presumption" Is use of a conclusive "pregnancy presumption" instead of individualized weighing of attachments arising from nature and nurture sufficiently narrowly-tailored to serve the state's objectives and survive equal-protection scrutiny?*

In effect, California has adopted an uncodified, irrebuttable "pregnancy presumption" as a substantive rule of law, governing parentage disputes involving birth mothers. This Court should consider whether that presumption is sufficiently narrowly-tailored to California's articulated objec-

tives for its parentage statutes to meet heightened substantive due-process and equal-protection standards.

Under the California decision, the appellate court's gender-based generalities about the psychological bonds women form during pregnancy bar case-by-case consideration of real-world relationships in maternity cases. Yet the quality of an individual putative father's real-world parental and marital relationships often outweigh biology in paternity cases.

In other words, the California decision judicially creates an irrebuttable-presumption that nature is stronger than nurture for all putative mothers. The same statutes, applied to paternity cases, require individualized evidence and assessment of each putative father's relationships with the child, the mother and the child's siblings.

Such broad, gender-based generalities just don't match up with our daily lives and experiences. Many, if not most, husbands form deep attachments to expected children during their wives' pregnancies, even when they know (as in cases of artificial insemination) that they are not biologically-related to the baby. News reports are full of stories about women with post-partum depression who fail to bond with their newborns, and women who abandon newborns – or worse. While gestation can be a powerful source of commitment and connectedness, life experience and daily headlines teach us all that it is far from a sure thing.

This case itself powerfully illustrates the fallacy of the gender-based generality that pregnancy is more likely to serve the state's goals than nurture. After nine months of pregnancy, and 29 days of caregiving, Kim turned Nathan over to his father. It took her five months to bring her 'emergency' custody request. The Court's evaluator found that Nathan has a deep and important mother-son bond with Amy, and weaker ties to Kim. He also found that Kim's parental judgment is so poor that she cannot be alone with Nathan. [Ex. 190-192] Because the trial judge felt con-

strained by the law not to apply the presumed-father laws, he could not consider the impact of his decision on Nathan, or the realities of Nathan's relationships and bonds.

This Court should decide whether a state may conclusively presume that a birth mother's gestational bonding always outweighs the emotional attachments that derive from the intimacy of daily association, that this Court has recognized in unwed-father cases,

> The difference between the developed parent-child relationship that was implicated in *Stanley* and *Caban*, and the potential relationship involved in *Quilloin* and this case, is both clear and significant. When an unwed father demonstrates a full commitment to the responsibilities of parenthood by "com[ing] forward to participate in the rearing of his child," *Caban*, 441 U.S., at 392, 99 S.Ct., at 1768, his interest in personal contact with his child acquires substantial protection under the due process clause. At that point it may be said that he "act[s] as a father toward his children." [Citation] But the mere existence of a biological link does not merit equivalent constitutional protection. The actions of judges neither create nor sever genetic bonds. "[T]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promot[ing] a way of life' through the instruction of children as well as from the fact of blood relationship." [Citations]
>
> *Lehr v. Robertson*, 463 U.S. 248, 261 (U.S. 1983)

California courts have emphasized that a central purpose of the statutory scheme is to protect the child's stable, permanent family ties. In a recent case, a California appellate court reiterated that policy, when applying the

presumed-father laws to a single woman raising a biologically-unrelated child,

> The judicial determination of paternity is thus a mixture of a search for genetic truth and the implementation of the strong public policies favoring marriage and family stability, and disfavoring labels of illegitimacy. A judgment establishing paternity can, therefore, be a decretal fiction.
>
> The effect of the section 7611 presumptions of paternity is that in certain cases, a man known not to be the child's genetic father is decreed to be the de jure father. [FN] Any doubt about this premise was dispelled by the decision in *Nicholas H.*, supra, 28 Cal. 4th 56. There, the man seeking to establish paternity conceded that he was not the genetic father. He did not meet the child's mother until three months before the child was born, but received the child into his home and openly raised Nicholas as his natural child. [FN] ... Our Supreme Court reversed the appellate court, holding that clear and convincing evidence of nonpaternity does not always overcome the presumption of paternity; rather, it overcomes it only "in an appropriate action." (*Nicholas H.*, at pp. 59, 63, 70.) The quoted phrase appears in the statute, and the phrase has no meaning unless it can mean that in a case where it is "inappropriate" to deny a judgment decreeing the paternity of a man known not to be the father, the presumption is unrebutted, and the decree should issue. (Id. at p. 70.)
>
> Further, one of the key holdings of *Nicholas H.* is "that a man does not lose his status as a presumed father by admitting he is not the biological father." (*Nicholas H.*, supra, 28 Cal. 4th at p. 63.)
>
> The foregoing principles should apply equally to women. (*Johnson v. Calvert* (1993) 5 Cal. 4th 84, 89; §7650.) It then follows that here, where no one

> nominated the birth mother as a candidate for a declaration of maternity, the fact that Leticia was assumed not to be the birth mother "by clear and convincing evidence" consisting of her own admission against interest, does not necessarily rebut the presumption of maternity flowing from her taking Karen into her home and raising her as her own child. Rather, a determination must be made whether this is "an appropriate action" to rule that the presumption has been rebutted by clear and convincing evidence.
>
> *In re Karen C.*, supra, 101 Cal.App.4th 936-938.

The *Amy G.* court distinguished *Karen C.*, "the birth mother was absent and there was no competing claim to maternity." *Amy G. v. M.W.* supra, 142 Cal.App.4th 1, 13

In his dissent in *Troxel*, Justice Stevens observes that a parent's rights with respect to her child are limited by the existence of an actual, developed relationship with the child,

> A parent's rights with respect to her child have thus never been regarded as absolute, but rather are limited by the existence of an actual, developed relationship with a child, and are tied to the presence or absence of some embodiment of family.
>
> *Troxel v. Granville*, supra. 530 U.S. 87-88 (Stevens, diss.).

California's appellate court gave short shrift to whether the judicially-created conclusive "pregnancy presumption" serves that public policy goal. Under the *Amy G.* decision, despite the absence of any significant embodiment of a family relationship, Kim's pregnancy requires that she be recognized as Nathan's mother, even though a birth father who turned the child over to the mother and her husband, would not be entitled to automatic parenthood.

Here, if the law applied the same standard to maternity and paternity cases, the trial court could have considered whether the gestational bonds outweighed years of day-to-

day childrearing, where the birth mother gave the child to the father and his wife to raise as a child of their marriage, and subsequently changed her mind. The biological differences between men and women would not have been irrelevant – men can't assert gestational bonds – and the court would have been free to consider the nature of those bonds in the relationship between this child and the two women competing for legal-mother status.

If gestation is sufficiently powerful to regulate parental status, may states also apply a maternal preference in child-custody cases?

D. *Fit Between Gender-Neutral Custody and Support Law and Gender-Based Parentage Scheme. Can a state that proclaims gender irrelevant to the exercise of the rights and responsibilities of parenthood, rely on gender-based generalities when regulating who gets those rights?*

Establishing parentage is the gateway to the rights, opportunity and responsibilities to raise a child, and to the responsibilities of child support. Parties usually bring parentage-establishment actions to secure custody and visitation rights or impose child support obligations.[4]

Twenty-first century American family law is almost entirely gender-neutral. For example, California's Family Code prohibits consideration of gender in child custody decisions (Cal. Fam. Code §3040(a)(1)), and is silent about

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[4] This Court has held that the rights of non-parents to relationships with children are very limited. *Troxel v. Granville*, supra, 530 U.S. 57. In California, the differences between the rights of parents and non-parents are great. Non-parents only receive custody when parental custody would be detrimental to a child. Cal. Fam. Code §3041. Parties may also establish parentage to secure rights to inheritance, government or insurance benefits, wrongful-death damages or other derivative rights. A non-custodial parent automatically gets custody of a child in the event a custodial parent dies or abandons the child. Cal. Fam. Code §3010.

gender when awarding child and spousal support (Cal. Fam. Code §§3500-3558).

It is hard to reconcile a state's use of gender-based generalities to decide *who is a parent*, when its laws prohibit consideration gender to decide *who has custody, or pays support*.

This question has broader implications than these facts present. If states may conclude that gestational bonds outweigh all other factors, then states may constitutionally enact a maternal preference for child-custody as well. By articulating a clear standard for the gender claims raised in this case, this Court will provide important guidance for a broader scope of custody and parentage cases heard in state courts.

E. Conclusion: This case provides an opportunity for this Court to clearly articulate a more unified view of the constitutional parameters governing state resort to gender-based classifications in parentage and custody matters.

The constitutional principles and issues presented by this case have broad application to American family law. Gender issues recur, in many guises, in family court parentage, custody, visitation, guardianship and child-protection cases across this nation.

Maternity cases are becoming more frequent. In just California alone in recent years, a number of maternity cases have resulted in published appellate decisions. Gender-neutral parentage laws would apply to each of those cases, and may have changed the outcome in some of them.[5]

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[5] See, for example, *Adoption of Matthew B.*, 232 Cal.App.3d 1239 (Cal. 1991) (traditional surrogacy); *Johnson v. Calvert*, 5 Cal.4th 8 (Cal. 1993) (gestational surrogacy); *Marriage of Moschetta*, 25 Cal.App.4th 121 (Cal.1994) (gestational surrogacy); *Prato-Morrison v. Doe*, 103 Cal.App.4th 222 (Cal. 2002) (embryo misappropriation); *In re Karen C.*, supra, 101 Cal.App.4th 93 (de facto adoption); *Robert B. v. Susan B.*, 109 Cal.App.4th 110 (Cal. 2003) (embryo misappropriation); *In re Salvador M.*, 111 Cal.App.4th 135 (Cal. 2003) (adult

The proliferation of so many published maternity decisions, in a single state illustrates the importance of the question presented by this case.

This Court has not considered a family-law case involving the constitutionally-protected parent-child relationships in the eight years since *Troxel*. Yet family law occupies a huge percentage of state trial court calendars, and plays a tremendous role in American jurisprudence.

Litigation, with its often overwhelming stressors, expense, and terrifying uncertainties, is hard on families and children. Few family law cases reach this Court, not because few have constitutional ramifications, and not because family law is almost entirely governed by state law. This Court gets few of these cases because so few families have the economic and emotional wherewithal to come so far. The number of family law cases this Court accepts are disproportionately small to numbers of cases they impact, the impact this Court's family law decisions have on the lives of ordinary Americans. Most Americans' only contact with the justice system will be in family court or traffic court.

The more guidance states have about the constitutional parameters of family law, the less litigation families will have to endure. When this Court finds common ground and provides clear guidance, families and children benefit. State family law courts, struggling to manage overwhelming caseloads, also benefit greatly when this Court provides clear guidance.

This case comes to this Court with a clean record, and a clear question. It provides an excellent vehicle for this Court

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sibling raising mother's child as her own); *Elisa B. v. Superior Court*, supra, 37 Cal.4th 108 (county child-support agency seeks support from non-biological lesbian co-parent); *K.M. v. E.G.*, 37 Cal.4th 130 (Cal. 2005) (lesbian couple uses one partner's eggs to impregnate other partner); and *Kristine H. v. Lisa R.*, 37 Cal.4th 156 (Cal. 2005) (lesbian couple, pre-birth parentage stipulation and judgment).

to address the relationship between gender-based state laws, and fundamental liberty interests in parent-child relationships.

The human issues presented by this class of cases is compelling. This Court has yet to address the specific question this case presents. America's family courts, many American children, and many American families will be spared uncertainty and heartbreak if this Court reviews the decision below, and provides clear guidance.

The Petition for a Writ of Certiori should be granted.

Respectfully submitted,

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February 26, 2007

APPENDICES

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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

Amy G.,
Plaintiff and Appellant,
v.
M. W.,
Defendant and Respondent;
G. G.,
Defendant and Appellant.

G. G.,
Petitioner,
v.
SUPERIOR COURT OF LOS ANGELES COUNTY,
Respondent;
M. W.,
Real Party in Interest.

B182101
(Los Angeles County
Super. Ct. No. BF024437)

B187828
(Los Angeles County
Super. Ct. No. BF023845)

COURT OF APPEAL
SECOND DIST.
FILED
AUG 17 2006
JOSEPH A. LANE, Clerk

APPEAL from an order of the Superior Court of Los Angeles County, Mitchell L. Beckloff, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

PETITION for Writ of Prohibition. Petition denied.

APPENDIX A

Goodman & Metz and Diane M. Goodman for Plaintiff and Appellant Amy G.

Leslie Ellen Shear; and Robert J. Friedman for Defendant, Appellant and Petitioner G. G.

No appearance for Respondent Superior Court of Los Angeles County.

Law Office of Levin & Margolin, Lionel P. Levin; Barbakow & Ribet and Claudia Ribet for Defendant, Respondent and Real Party in Interest M. W.

INTRODUCTION

M. W. (hereafter Kim) and G. G. (father) are the biological parents of three year-old Nathan. Father and his wife, Amy, have raised Nathan in their home since he was one month old.

In an action brought by Kim for custody and visitation rights to her biological child, the trial court denied father's motion to join Amy as a party. Father filed a petition for writ of prohibition to vacate the court's order and to join Amy in the action.

Amy also brought a separate action against Kim and father, to be declared Nathan's presumed mother; the trial court granted Kim's motion to quash and dismissed that action. Amy and father appealed that order.

In this consolidated petition and appeal, father and Amy argue that Amy is Nathan's presumed mother, and therefore the trial court erred in denying Amy joinder or standing. Father and Amy's arguments present the question of whether the statutory presumptions of paternity contained in the Family Code enable the wife of a man who fathered a child in an extramarital relationship to assert status as the child's mother, when the child's biological mother has come forward promptly to assert her maternal rights.

We answer no, and affirm. We uphold the trial court's denial of father's motion to join Amy and its order granting Kim's motion to quash Amy's independent action.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts.*

Father is married to Amy. During his marriage to Amy, he had an extramarital relationship with Kim, the real party in interest. That relationship resulted in a child, Nathan.

During her relationship with father, Kim was married to Steven, but they were at the time of Nathan's conception and birth.

Nathan is Kim's only child. Father and Amy have two daughters.

The parties disagree as to their intent and as to the circumstances of Nathan's conception and birth. Father asserts Kim offered to bear a child who would be raised as a child of his marriage to Amy. Kim contends her relationship with father was romantic, the pregnancy was unplanned, and that she expected they would raise Nathan jointly.

Kim concealed her pregnancy from business associates, acquaintances, family and friends and left California for Virginia, where she gave birth to Nathan. Kim cared for Nathan during his first month in Virginia.

In June 2003, when Nathan was one-month old, father came to Virginia to take him to California. Father met with Kim in a hotel lobby. He presented Kim with an "Agreement Regarding Custody and Adoption" (the Agreement), drafted by a Maryland law firm he had retained.

The Agreement provided: father would have sole custody over Nathan; Kim would have no visitation; and Kim consented to a stepparent adoption by Amy.

The Agreement also contained recitals to the effect that Kim acknowledged and was aware of her right to obtain independent counsel, father's counsel had not provided her with any legal advice in connection with the Agreement, she was executing the Agreement freely and voluntarily, and the Agreement was not the product of any fraud, duress or undue influence. Kim and father signed the Agreement

while sitting in father's limousine.[1]

Kim did not have a lawyer when she signed the document. She contends she did not understand what she was signing and felt pressured to do so.

After signing the Agreement, they returned to the hotel lobby where father picked up Nathan. Kim handed father all of Nathan's clothes, formula, diapers and toys.

That evening, father flew with Nathan back to Los Angeles.

Since June 29, 2003, Nathan has lived continuously with father and his family and has never been alone with Kim.

2. *Proceedings.*

On September 29, 2003, Kim filed a petition against father to establish parental relationship, seeking child support, custody and visitation. Thereafter, Kim brought an order to show cause. Kim did not serve the papers until November 11, 2003.

Father responded, requesting the court to deny Kim the relief she requested and to enter a judgment of parentage recognizing Amy as the mother.

a. *Father's initial motion for joinder of Amy as a necessary party.*

On December 18, 2003, at a hearing on Kim's order to show cause, father argued that Amy was a necessary party and Kim's custody request could not be heard without Amy's joinder. The trial court denied father's request for joinder, ruling, inter alia, Amy "is completely aligned" with father and therefore her interests were adequately protected.

In a supplemental memorandum of points and authorities, father unsuccessfully argued, inter alia, Amy was the presumed natural mother of Nathan pursuant to Family Code section 7611, subdivision (d) "because she has taken him into her home, held him out as her son, and played all

---

[1] Amy did not pursue a stepparent adoption of Nathan.

the social, psychological and economic roles of mother since he was one month old . . . ."[2]

b. *Amy's independent action to establish parental relationship.*

On January 26, 2004, after father failed in his attempt to join Amy in Kim's action, Amy filed a separate action, naming Kim and father, to establish her status as Nathan's mother. Amy brought the action pursuant to section 7650, which provides in relevant part: "Any interested person may bring an action to determine the existence or nonexistence of a mother and child relationship." (§ 7650, subd. (a).)

On June 23, 2004, the trial court granted Kim's motion to quash, ruling that Amy was not an interested person within the meaning of section 7650 because she was not biologically related to the child with whom she sought to establish a parental relationship.

Thereafter, the trial court granted reconsideration, again granted the motion to quash, and dismissed Amy's action with prejudice.

On March 24, 2005, Amy and father filed a timely notice of appeal from the order of dismissal.

c. *Proceedings in Kim's action; trial court again denies joinder of Amy.*

Turning our focus back to Kim's action, on February 9, 2004, the trial court ordered that Kim have monitored visitation with Nathan for four hours per week.

On March 12, 2004, the parties stipulated to the appointment of Dr. Jeffrey Lulow to conduct a child custody evaluation.

On August 15, 2005, father filed a written motion for joinder of Amy as well as Steven. With respect to the facts showing that Amy was either indispensable or a necessary party, the motion denied Kim's parentage and contended:

---

[2] All further statutory references are to the Family Code, unless otherwise indicated.

Amy is Nathan's mother, Amy "has exercised actual custody of Nathan and asserted custody rights since Nathan was less than a month old" and a complete and effective judgment could not be had without joining Amy as a party.

Father also sought to join Steven, Kim's husband at the time of the child's conception and birth, in order to establish father's paternity with finality.

Father argued joinder was mandatory and complete relief could not be had without joining Amy and Steven as parties.

On August 30, 2005, nearly 18 months after the March 12, 2004 order appointing Dr. Lulow, he completed his evaluation.

On September 15, 2005, Steven filed a responsive declaration stating he was making no claim to parentage of Nathan, that he was willing to appear in the action solely for the purpose of entering into a binding waiver of a claim to parentage, and that he did not wish to be otherwise joined as a party to the litigation.

By way of opposition to the joinder motion, Kim argued Amy was merely a stepparent and she had no standing to allege maternity.

On October 21, 2005, the matter came on for hearing. The trial court refused to take judicial notice of the child custody evaluation for purposes of the joinder motion and stated it had not read the report. The trial court denied father's motion for joinder of Amy and Steven.[3]

The reporter's transcript of the hearing on the joinder motion sets forth the trial court's reasoning herein. The trial court repeatedly asked, "How is Amy . . . any different

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[3] This court has reviewed Dr. Lulow's report, which discusses, inter alia, the bond between Amy and Nathan. The contents of the report do not affect our legal interpretation with respect to the application of the parentage statutes.

from a live-in nanny?"[4] The trial court also commented, "[Amy] doesn't have custody rights. [Father] has custody rights. And she happens to live with [father]."

d. *Subsequent proceedings.*

On December 19, 2005, father filed the instant petition for writ of prohibition or other appropriate relief, seeking to preclude the trial court from conducting a trial in this matter without first joining Amy and Steven as parties.

This court issued an order to show cause, stayed proceedings in the trial court, granted a motion to expedite the appeal, and consolidated the appeal and the writ petition for hearing before this court.

CONTENTIONS

In the writ petition and appeal, Amy and father contend the trial court erred in denying father's motion to join Amy and in granting Kim's motion to quash Amy's independent action. We summarize their contentions as follows:

1. Amy must be joined in the action pursuant to Code of Civil Procedure section 389, subdivision (a), and Family Law Rules, rule 5.158(a);[5]

2. Amy is an "interested person" under section 7650, subdivision (a), and therefore has standing to maintain her independent action to establish a mother-child relationship;

3. Section 7650, subdivision (a), mandates gender-neutral application of the presumed father statutes;

4. Amy is Nathan's presumed mother under sections 7611, subdivisions (a) and (d), and 7540;

5. Any interpretation of the relevant Family Code provisions to deny Amy joinder or standing violates equal protection and due process; and

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[4] Although we affirm the trial court's decision, we find this comment, comparing Amy to a domestic employee, unfortunate.

[5] All further rule references are to the Family Law Rules.

6. Amy has standing to assert equitable estoppel.

Father additionally contends the trial court erred in failing to join Steven.

We reject all of their contentions. We find no error in the trial court's denial of father's motion to join Amy, and therefore deny father's petition for writ of prohibition. We also affirm the trial court's grant of Kim's motion to quash Amy's independent action.

DISCUSSION

1. *Standard of review*

The essential facts, including Kim's status as Nathan's biological mother, father's biological paternity, and Amy's status as father's spouse, are undisputed. Therefore, the essential issue presented is whether Amy is entitled to joinder or standing pursuant to provisions found in either the Code of Civil Procedure or the Family Code. "Statutory interpretation is a question of law, which appellate courts review de novo. [Citations.]" (*Librers v. Black* (2005) 129 Cal.App.4th 114, 124.)

2. *Overview of arguments: pertinent joinder and standing provisions invoked by father and Amy.*

   a. *Compulsory joinder: Code of Civil Procedure section 389, subdivision (a).*

Generally, a person "shall be joined as a party in the action if . . . [she] claims an interest relating to the subject of the action and is so situated that the disposition of the action in [her] absence may . . . as a practical matter impair or impede [her] ability to protect that interest . . . ." (Code Civ. Proc., § 389, subd. (a).)

County of Los Angeles v. Sheldon P. (2002) 102 Cal.App. 4th 1337, held a person who meets the criteria of Code of Civil Procedure section 389, subdivision (a), must be joined even if the person to be joined has little chance of prevailing on the merits. In that case, the child's biological father requested another man be joined who was not the child's biological father and who had no social relationship with

the child, but who had signed a voluntary declaration of paternity at the time the child was born. (*Sheldon P., supra*, at pp. 1342-1344.) Because the voluntary declaration of paternity gave the other man status as a presumed father and entitled him to certain rights, and that person's absence from the action could impair that person's interest, joinder was required. (*Id.* at pp. 1344-1345.)

Father contends that, like the voluntary declarant in *Sheldon P.* who had a claim to be the child's father, Amy has a claim to be Nathan's mother. Therefore, Amy's joinder is mandatory pursuant to Code of Civil Procedure section 389, subdivision (a), because her absence in this action will impede or impair her ability to protect this interest.

b. *Joinder under section 7635, subdivision (b).*

Section 7635, subdivision (b), sets forth persons who may be made parties to a *parentage* action. "The natural mother, each man presumed to be the father under Section 7611, and each man alleged to be the natural father, may be made parties and shall be given notice of the action . . . and an opportunity to be heard." (§ 7635, subd. (b).)

Generally, the rules set forth in the Uniform Parentage Act (UPA) (§ 7600 et seq.) pertaining to paternity actions apply equally to maternity actions under section 7650, subdivision (a).[6] Father argues we read section 7635, subdivision (b), in a gender-neutral manner, thus *requiring*[7] Amy's joinder. (§§ 7650, subd. (a), 7635, subd. (b).)

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[6] Section 7650, subdivision (a) reads in full, "Any interested person may bring an action to determine the existence or nonexistence of a mother and child relationship. Insofar as practicable, the provisions of this part [the UPA] applicable to the father and child relationship apply."

[7] The language "may be made parties" in section 7635, subdivision (b), suggests this section is a permissive joinder rule, not a mandatory joinder rule. However, because we find Amy cannot be Nathan's presumed mother under section 7611 or Nathan's natural mother, we need not decide whether the trial court erred in refusing to grant Amy permissive joinder in the action.

c. *Joinder under rule 5.158(a).*

Rule 5.158(a) provides: "The court must order joined as a party to the proceeding any person the court discovers has physical custody or claims custody or visitation rights *with respect to any minor child of the marriage.*" (Italics added.) Father and Amy do not dispute Nathan's birth arose from an extramarital affair between father and Kim, and not from the marital relationship between father and Amy. Father and Amy do not claim to have adopted Nathan. Rather, they argue, through a gender-neutral application of the Family Code, Nathan is *presumed* to be a child of the marriage because Amy was married to and cohabiting with father when Nathan was born. (§ 7540.) Because Amy claims custody over Nathan, and Amy and father argue Nathan is a presumed child of the marriage, father contends Amy must be made a party to the action.

d. *Standing to bring maternity action under section 7650, subdivision (a).*

Section 7650, subdivision (a) allows any "interested person" standing to bring a maternity action. Father and Amy argue Amy is an "interested person" because she claims to be Nathan's mother, and therefore the trial court erred in granting Kim's motion to quash Amy's independent action.

Having set forth father and Amy's theories, we now turn to the merits.

3. *Father and Amy's arguments are unavailing because Amy cannot be deemed to be Nathan's mother.*

As outlined above, father and Amy's arguments all are predicated on Amy's claim she is Nathan's mother. Therefore, our threshold question is whether Amy can assert status as Nathan's mother in view of the undisputed fact that Kim, a party to both actions, is Nathan's biological mother.

Amy and father advance several arguments as to why Amy can allege status as Nathan's mother. Amy and father allege Amy is Nathan's presumed mother under section 7611, subdivisions (a) and (d). They further allege Amy is

conclusively presumed to be Nathan's mother under section 7540. They also take the position Amy is Nathan's natural mother within the meaning of section 7635, subdivision (b). Based on any and all of these claims, Amy and father argue Amy is entitled either to joinder in Kim's action or to standing to bring an independent maternity action. As explained, none of these theories has merit.

a. *Amy cannot establish status as Nathan's presumed mother under section 7611, subdivisions (a) and (d).*

Section 7611 sets forth various circumstances wherein the court will presume a man to be a child's father. "A man is presumed to be the natural father of the child if . . . [¶] (a) He and the child's natural mother are or have been married to each other and the child is born during the marriage . . . ." (§ 7611, subd. (a).) A man is also presumed to be the natural father of the child if "[h]e receives the child into his home and openly holds out the child as his natural child." (§ 7611, subd. (d).)

The UPA specifically provides *maternity* may be established "by proof of her having given birth to the child, *or under this part* [i.e., the UPA, § 7600 et seq]." (§ 7610, subd. (a), italics added.)[8] The UPA also provides, as discussed above, the rules pertaining to paternity actions apply equally to maternity actions. (§ 7650, subd. (a).) Therefore, the question presented is the applicability of section 7611, pertaining to presumed fathers, to Amy.

In general, California law only recognizes one mother. (*Johnson v. Calvert* (1993) 5 Cal.4th 84, 92, fn. 8.) Amy and father do not dispute that Kim gave birth to Nathan, making Kim the natural mother under section 7610, subdivision (a). However, because section 7610, subdivision (a), provides maternity may be established "by proof of her

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[8] In contrast, the father and child relationship may be established simply "under this part." (§ 7610, subd. (b).)

having given birth to the child, *or under this part* [i.e., the UPA]" (§ 7610, subd. (a), italics added), Amy and father assert Amy's maternity based on the presumed father provisions of section 7611, subdivisions (a) and (d), which they seek to apply in a gender-neutral manner. Amy and father argue Amy is Nathan's presumed mother under section 7611, subdivision (a), by virtue of her marriage to father, and under section 7611, subdivision (d), because she received Nathan into her home and held him out as her own child. Neither the case law nor the statutory framework supports this argument.

In limited circumstances, the presumptions of paternity listed in section 7611 have been interpreted to apply to women. (*See, e.g., In re Karen C.* (2002) 101 Cal.App.4th 932, 937-938; *In re Salvador M.* (2003) 111 Cal.App.4th 1353, 1357-1358; *Elisa B. v. Superior Court* (2005) 37 Cal.4th 108, 119-120, 125.)

In *Karen C.*, the birth mother gave her child to another woman when the child was born and subsequently absented herself. (*In re Karen C., supra*, 101 Cal.App.4th at p. 934.) The other woman, who took the child into her home and raised the child as her own, was presumed to be the child's mother under section 7611, subdivision (d). (*Id.* at p. 938.) Similarly, in *Salvador M.*, where the birth mother was deceased, the child's adult half-sister who raised the child since his mother's death was presumed to be his mother under section 7611, subdivision (d). (*In re Salvador M., supra*, 111 Cal.App.4th at pp. 1355-1358.) Thus, in both *Karen C.* and *Salvador M.*, the birth mother was absent and there was no competing claim to maternity.

Elisa B. applied section 7611, subdivision (d), to declare a woman, Elisa, a presumed mother of the twin children born to her same-sex partner, Emily. (*Elisa B. v. Superior Court, supra*, 37 Cal.4th at pp. 113-114, 125.) After the relationship ended, a county district attorney sued Elisa for child support on behalf of the twins. (*Id.* at pp. 113, 115.) Elisa had actively participated in causing the children to be conceived with the understanding that she would raise the

children as her own together with Emily. Once the children were born, Elisa received them into her home and openly held them out as her own. (*Id.* at pp. 113, 125.) Given these circumstances, the court declared Elisa a presumed mother under section 7611, subdivision (d), perceiving "no reason" why both parents of a child cannot be women. (*Elisa B. v. Superior Court, supra,* at pp. 119, 125.) In reaching this conclusion, the court specifically noted there were "*no competing claims to her being the children's second parent.*" (*Id.* at p. 125, italics added.)

Father and Amy rely on *Elisa B.* for the proposition that section 7611 should apply in maternity cases even where the child's birth mother is present and asserts legal parenthood. However, *Elisa B.* is distinguishable. Here, Nathan's natural father is known and present in the action. Nathan only can have one additional parent. Both father and Amy concede that Kim is Nathan's biological mother. By alleging presumed maternity, Amy advances a competing claim to be Nathan's second parent. Because the absence of a competing claim to be the second parent specifically drove the Elisa B. court's decision, *Elisa B.* cannot control this case.

The cases cited by Amy and father where the courts applied the presumed father statute, section 7611, to recognize a presumed mother all involved circumstances where there was *no competing claim* to be the child's mother or second parent. (*Elisa B. v. Superior Court, supra,* 37 Cal.4th at p. 125; *In re Karen C., supra,* 101 Cal.App.4th at p. 938; *In re Salvador M., supra,* 111 Cal.App.4th at p. 1359.) Here, unlike those cases, both the child's biological father and biological mother have identified themselves and come forward to assert their legal parentage. Under these circumstances, it is not appropriate to invoke a gender-neutral reading of the paternity presumptions to provide Nathan with another mother. To allow Amy an opportunity to be declared Nathan's mother through a gender-neutral reading of the UPA would arrive at an impracticable result. (§ 7650, subd. (a).)

b. Jesusa V. is unavailing to father and Amy.

Moreover, the UPA framework does not support Amy's joinder or standing as an alleged presumed mother under section 7611 because the statutory scheme provides no mechanism to resolve her and Kim's competing maternity claims. Amy and father argue section 7612, subdivision (b), would direct the trial court to weigh evidence pertaining to "policy and logic" to determine whether Amy or Kim would prevail as Nathan's legal mother.[9] (§ 7612, subd. (b).)

In support of their theory, Father and Amy cite *In re Jesusa V.* (2004) 32 Cal.4th 588. In that case, section 7612, subdivision (b), was utilized to resolve competing paternity claims between the child's biological father, who qualified under section 7611, subdivision (d), and the mother's husband, who qualified under section 7611, subdivisions (a) and (d). (*In re Jesusa V., supra*, 32 Cal.4th at pp. 603-607; *see also Craig L. v. Sandy S.* (2004) 125 Cal.App.4th 36, 53 [applying *Jesusa V.* to competing claims of paternity].)

Father and Amy's argument fails because, unlike *Jesusa V.*, this case does not present a conflict between two persons presumed to be a child's parent under section 7611. Kim is not Nathan's presumed mother under section 7611; rather her maternity is established under section 7610, subdivision (a), based on her having given birth to Nathan.

Section 7612, subdivision (b), specifically applies to "two or more presumptions aris[ing] under Section 7611," such as was the case in *Jesusa V.* (§ 7612, subd. (b); *In re Jesusa V., supra*, 32 Cal.4th at pp. 603, 607.) Accordingly, section 7612, subdivision (b), does not apply where a presumed maternity claim arising under a genderneutral reading of section 7611 conflicts with a maternity claim pursuant to section 7610, subdivision (a). No mechanism exists in other provisions of the UPA to resolve such a conflict. Therefore, we do not find the UPA framework allows Amy an opportu-

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[9] Section 7612, subdivision (b), reads in full: "If two or more presumptions arise under Section 7611 which conflict with each other, the presumption which on the facts is founded on the weightier considerations of policy and logic controls."

nity to assert status as Nathan's presumed mother where Kim, Nathan's biological mother, has come forward promptly to assert her maternal rights.

c. *Amy is not Nathan's presumed mother under section 7540.*

Father and Amy alternatively contend Amy is conclusively presumed to be mother under section 7540, which provides, "*Except as provided in Section 7541*, the child of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage." (§ 7540, italics added.) According to father and Amy, because section 7650, subdivision (a), mandates application of paternity rules to maternity actions, Nathan is conclusively presumed to be a child of father and Amy's marriage under section 7540.

Their argument is without merit. In their interpretation of section 7540, Amy and father overlook the statute's qualifying phrase "*Except as provided in Section 7541 . . . .*" (§ 7540, italics added.) Section 7541, subdivision (a), overrides the presumption of paternity under section 7540 if blood tests reveal that the biological mother's husband is not the father of the child.[10] Assuming arguendo, we apply a gender-neutral reading of section 7540, we must also apply a gender-neutral reading of section 7541, which would negate a wife's conclusive presumption of maternity when blood tests reveal she is not the mother of the child.

Here, no blood tests are required. It is undisputed that Kim, not Amy, is Nathan's biological mother. Accordingly, Amy cannot enjoy a conclusive presumption of maternity under section 7540.

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[10] Section 7541, subdivision (a), reads in full: "Notwithstanding Section 7540, if the court finds that the conclusions of all the experts, as disclosed by the evidence based on blood tests performed pursuant to Chapter 2 (commencing with Section 7550), are that the husband is not the father of the child, the question of paternity of the husband shall be resolved accordingly."

d. *Amy cannot assert status as Nathan's natural mother*

We also reject Amy and father's additional suggestion that Amy is Nathan's natural mother, and therefore can be joined pursuant to section 7635, subdivision (b). While the word "natural" is not always interpreted as synonymous with "biological," (*see, e.g., In re Nicholas H.* (2002) 28 Cal.4th 56, 64), the language of section 7635, subdivision (b), expressly refers to the "natural mother" and also differentiates between "each man *presumed* to be the father under Section 7611, and each man alleged to be the *natural* father . . . ." (§ 7635, subd. (b), italics added.) Because the statutory language provides this distinction, we interpret "natural mother" here to refer to the biological mother. Thus, Amy cannot be deemed to be Nathan's natural mother.

e. *Preliminary conclusion: trial court did not err in refusing to join Amy or in granting Kim's motion to quash Amy's separate action.*

For the reasons discussed above, we hold, where as here, a birth mother promptly comes forward to assert her legal maternity, and the child's father is undisputed and present in the action, the father's spouse cannot be the child's natural mother or the child's presumed mother through a gender-neutral reading of either section 7611, subdivisions (a) and (d), or section 7540.

Because Amy cannot legally be Nathan's mother under these circumstances, Amy cannot "claim[] an interest relating to the subject of the action" which would require her joinder under Code of Civil Procedure section 389, subdivision (a). Amy is not Nathan's natural mother or presumed mother and therefore is not a person who may be made a party to the action under section 7635, subdivision (b); for the same reasons, she is not an "interested person" within the meaning of section 7650, subdivision (a); and she cannot claim custody rights under rule 5.158(a) because Nathan is not a child of the marriage between Amy and father.

For these reasons, we find no error in either the trial court's denial of father's motion to join Amy or its grant of Kim's motion to quash Amy's independent action.

4. *The statutory scheme does not violate equal protection or due process.*

a. *Equal protection.*

Amy and father contend an interpretation of the statutory scheme which denies Amy joinder or standing violates equal protection.

Father and Amy rely on *Elisa B.* for the proposition that the statutory scheme, if interpreted to deny Amy's joinder, violates equal protection on the basis of sexual orientation. *Elisa B.* held a woman in a same-sex relationship with the biological mother could be declared the child's presumed mother under section 7611, subdivision (d), even though the biological mother is present in the action. (*See Elisa B. v. Superior Court*, *supra*, 37 Cal.4th at pp. 118-119, 125.) Father and Amy argue that to deny Amy a similar opportunity to establish status as a presumed mother effectively treats a heterosexual woman differently than a similarly situated woman in a same-sex relationship.

Relying on *Jesusa V.*, father and Amy also argue that the statutory scheme, if applied to deny Amy's joinder, violates equal protection on the basis of gender. *Jesusa V.* held a man who received a child into his home and held the child out as his own could qualify as the presumed father under section 7611, subdivision (d), even though the biological father also was a party to the proceedings. (*In re Jesusa V.*, *supra*, 32 Cal.4th at pp. 603-604.) Father and Amy argue that to deny Amy a similar opportunity to assert her status as a presumed mother treats a woman differently than a similarly situated man.

These arguments are also without merit. "The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner." (*In re Eric J.* (1979) 25 Cal.3d 522, 530.) To prevail on either of their equal protection claims,

father and Amy must first demonstrate that Amy is similarly situated to the individuals she describes who have asserted presumed parentage under the statutory scheme. As explained, Amy is not similarly situated to either the biological mother's same-sex partner in *Elisa B.* or the nonbiological presumed father in *Jesusa V.*

In a situation such as *Elisa B.*, where two women are same-sex partners, and one gives birth to a child while the other holds the children out as her own, *there is no third person who claims to be the child's second parent.* In contrast, a woman, such as Amy, who is married to the child's father and wishes to assert presumed maternity, is competing with the child's biological mother for maternal rights. Unlike the circumstances in *Elisa B.*, where it was appropriate to provide a *second* parent for the child, here two parents, Kim and father, already are present in the action. Therefore, we reject Amy's claim she is being denied equal protection based on her sexual orientation.

Likewise, Amy is not similarly situated to a nonbiological father, such as in *Jesusa V.*, who receives his wife's child into his home and holds the child out as his own. While a biological father's genetic contribution to his child may arise from nothing more than a fleeting encounter, the biological mother carries the child for the nine-month gestational period. Because of this inherent difference between men and women with respect to reproduction, the wife of a man who fathered a child with another woman is not similarly situated to a man whose wife was impregnated by another man. Therefore, it is appropriate for the Family Code to allow the birth mother's husband to claim presumed paternity when the biological father is present in the action, and not allow the wife of the biological father to do the same when the biological mother has promptly come forward to assert her parental rights. "The difference between men and women in relation to the birth process is a real one, and the principle of equal protection does not forbid [the Legislature] to address the problem at hand in a manner specific to each gender." (*Tuan Anh Nguyen v. INS* (2001) 533 U.S. 53,

73 [150 L.Ed.2d 115] [upholding a federal law imposing different requirements for citizenship of a child born to one citizen parent and one noncitizen parent, depending upon whether the citizen parent is the mother or the father].) Given Kim's role and presence as Nathan's biological mother, Amy is not similarly situated to a nonbiological presumed father.

Therefore, we reject father and Amy's equal protection arguments.

b. *Due process.*

Father and Amy also contend that the statutory scheme, as applied to deny Amy joinder or standing, violates substantive due process and infringes on family privacy and the integrity of the marital family unit. This argument is unpersuasive. Amy and father are asserting a purported right to raise a child resulting from an extramarital relationship between father and another woman, so as to displace the biological mother. It is unfortunate these proceedings already have spanned nearly three years. However, Kim first sought to assert her maternal rights shortly after Nathan was born, and Kim has since enjoyed monitored visitation with Nathan. Under such circumstances, we perceive no substantive due process or other constitutional claim.

5. *Amy cannot assert equitable estoppel claim arising out of purported stepparent adoption agreement.*

Amy and father contend Amy has standing to assert parentage based on equitable estoppel. Relying on *Adoption of Matthew B.* (1991) 232 Cal.App.3d 1239, they argue Kim is estopped to deny Amy's maternity. *Matthew B.* involved a surrogate mother who sought to withdraw her consent to a stepparent adoption and to obtain periods of custody. (*Id.* at pp. 1252-1253.)

Father and Amy's reliance on *Matthew B.* or on an equitable estoppel theory is misplaced. Kim's role was not that of a surrogate mother. Further, Father and Amy do not assert the purported stepparent adoption agreement executed by Kim is valid. Further, irrespective of whether

the purported agreement is valid, father and Amy never pursued a stepparent adoption by Amy or took any steps to implement the purported agreement. Therefore, we reject their theory that Kim is estopped to deny Amy's maternity.

6. *Trial court did not err in failing to join Steven pursuant to Code of Civil Procedure section 389, subdivision (a).*

Father also contends the trial court erred in failing to join Steven, Kim's husband, because Steven is a mandatory party pursuant to Code of Civil Procedure section 389, subdivision (a).

We recognize *Sheldon P.* required joinder of a man who was a presumed father, even though he had little chance of prevailing on the merits. (*See County of Los Angeles v. Sheldon P.*, *supra*, 102 Cal.App.4th at pp. 1344-1345.) Here, Steven is statutorily presumed to be Nathan's father under section 7611, subdivision (a), by virtue of his marriage to Kim. Because Steven theoretically has a valid claim to be Nathan's father, arguably he must be joined under Code of Civil Procedure section 389, subdivision (a).

However, Nathan's paternity is not an issue in this case. G. G. asserts he is Nathan's father, and Steven concurs. While Steven has not been joined formally as a party in the action, he has received notice of the action and an opportunity to be heard via his September 15, 2005 responsive declaration. In the declaration, Steven eschewed paternity, stating he agreed to enter into a binding waiver of a claim to parentage. Unlike in *Sheldon P.*, where there existed "the potential to deprive . . . the presumed father . . . of rights he wishes to assert," here Steven has agreed to waive all such rights. (*County of Los Angeles v. Sheldon P.*, *supra*, 102 Cal.App.4th at p. 1345.) In *Sheldon P.*, there was at least a theoretical possibility that the absent party would "'claim[] an interest relating to the subject of the action . . . .'" (*Id.* at p. 1344, citing Code Civ. Proc., § 389, subd. (a).) In marked contrast, Steven already has expressly waived any "interest relating to the subject of the action." (Code Civ. Proc., § 389, subd. (a).) Therefore, the trial court properly found Steven's

joinder is not compulsory under Code of Civil Procedure section 389, subdivision (a).

CONCLUSION

We conclude the trial court did not err either in denying father's motion to join Amy in the action or in granting Kim's motion to quash Amy's independent action. When a birth mother promptly comes forward to assert her legal maternity, and the child's father is undisputed and present in the action, the father's spouse cannot be presumed to be the child's mother under any gender-neutral reading of sections 7611, subdivisions (a) or (d), or 7540. Therefore, Amy cannot claim to be Nathan's mother. We further conclude, against father and Amy's contentions, that the trial court's refusal to treat Amy as a presumed mother does not violate equal protection or due process. Finally, we reject Amy and father's contentions that Amy has standing to assert equitable estoppel, and that Steven's joinder is mandatory.

DISPOSITION

The order to show cause is discharged. Father's petition for writ of prohibition or other appropriate relief is denied. The order granting Kim's motion to quash and dismissing Amy's independent action is affirmed. Kim shall recover her costs.

CERTIFIED FOR PUBLICATION

KLEIN, P. J.

We concur:
CROSKEY, J.
KITCHING, J.

SUPERIOR COURT FOR THE STATE OF CALIFORNIA
☐ NO FILE

Date: 09-09-04
HONORABLE MITCHELL L. BECKLOFF
6 H. CONTRERAS. Deputy Sheriff

Dept. CE27
M. DEWEY, Deputy Clerk
K. HONG, Court Assistant
NONE,-Court Reporter

8:30 am BF023845
MIKYUNG WARNER, Petitioner
and
GLADWIN GILL, Respondent

NO APPEARANCES

NATURE OF PROCEEDINGS:
COURT'S RULING ON SUBMITTED MATTER

Gill v . Warner Case No. BF 024437

RULING ON SUBMITTED MATTER

On June 23,2004, this court heard Respondent's Motion to Quash Instant Action. On that date, the court granted Respondent's motion finding that Petitioner did not have standing under Family Code section 7650 to bring this action. More specifically, the court found that under the reasoning of Robert B. v. Susan B. (2003) 109 Cal.App.4th 1009 that Petitioner was not an "interested person" within the meaning of Family Code section 7650 as Petitioner was biologically unrelated to the minor child for whom she sought to establish her parental relationship.

On June 30, 2004, Division Three of the Second Dis-

trict Court of Appeal published its decision in Kristine Renee H. v. Lisa Ann R. 120 Cal.App.4th 143 (2004). That case, specifically noted that Robert B. v. Susan B., supra, 109 Cal.App.4th at 1009 and other cases with similar standing analyses were not based on a gender-neutral application of the law as required by Family Code section 7650. Accordingly, the Court of Appeal in Kristine Renee H. granted standing to a woman in a parentage action even though she had no biological connection to the child at issue in the case.

Based on this new interpretation of the law, Petitioner timely filed her Motion for Reconsideration of Ruling. On July 28,2004, the court heard the motion, granted it, and then heard argument on Respondent's underlying motion to quash.

At the conclusion of the hearing, the court took the matter under submission.

While the matter was under submission, the California Supreme Court granted review in Kristine Renee H. (Cal. Supreme Court, Case No. S126945, Sept 1,2004.) (The California Supreme Court also granted review in two cases with similar issues that had been relied upon by Respondent in her argument before this court: Elisa B. v. Superior Court (2004) 118 Cal.App.4th 966 rev. granted S125912 Sept. 1,2004 and K.M. v. E.G. (2004) 118 Cal.App.4th 477 rev. granted S125643 Sept. 1,2004.)

California Rules of Court, Rule 976(d) specifies that no Court of Appeal opinion may be published where it is superceded by a grant of review by the Supreme Court. An unpublished decision "shall not be cited or relied on by a court. . . in any other action. . . ." (Cal. Rules of Court, Rule 977(a).) (The enumerated exceptions to this rule are inapplicable to this case.)

Accordingly, the court's rationale for granting the motion for reconsideration no longer exists and the case law relied upon by the court in reaching its decision on June 23, 2004 remains. The law supporting Petitioner's position now is as it was on June 23, 2004.

Respondent's Motion to Quash Instant Action filed March 22, 2004 is GRANTED. Respondent is to prepare an Order After Hearing in accordance with California Rules of Court, Rule 391.

A copy of this minute order is sent this date by way of facsimile transmission and first-class mail by the clerk as follows:

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MIKYUNG WARNER vs GLADWIN GILL
CF66100B0288

Dept. CE27
MINUTES ENTERED
09-09-04
CLERK

ORIGINAL FILED
JAN 24 2005
LOS ANGELES SUPERIOR COURT

LAW OFFICES OF LEVIN & MARGOLIN
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Beverly Hills, California 90211-3217
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Attorneys for
MIKYUNG WARNER & STEVEN WARNER

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

AMY GILL,
PETITIONER,
V.
MIKYUNG WARNER, STEVEN WARNER, GLADWIN GILL,
RESPONDENTS.

CASE NO. BF024437
ORDER RE DISMISSAL OF ACTION

The Court hereby GRANTS Respondent's MOTION TO QUASH the instant action filed on March 22, 2004, and dismisses the Petition in the within action with prejudice.
Approved as conforming to court order.

No Objection Received

DIANE GOODMAN, Esq.
Attorney for Petitioner Amy Gill
Dated: JAN 24 2005

COMMR. MITCHELL L BECKLOFF, JUDGE PRO TEM
LOS ANGELES SUPERIOR COURT

PROOF OF SERVICE

STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the 18 and not a party to the within action. My business address is 8484 Wilshire Boulevard, Suite 660, Beverly Hills, California 90211.

On February 3, 2005, I served the foregoing document described as ORDER RE DISMISSAL OF ACTION on the interested parties to this action by placing a true copy thereof in a sealed envelope, postage prepaid, at Beverly Hills, California, in the ordinary course of business, addressed as follows:

Diane M. Goodman, Esq., GOODMAN & METZ
17043 Ventura Blvd., Encino, CA 91316-4128
Leslie Ellen Shear, Esq.
16830 Ventura Blvd. Encino, CA 91436-1749
Diana D. Cooper, Esq., Law Offices of Ron W. Saxman
1200 Wilshire Blvd., Suite 400, Los Angeles, CA 90017
Robert J. Friedman, Esq.
9454 Wilshire Blvd., Suite 500
Beverly Hills, CA 90212-2908

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at Beverly Hills, California, in the ordinary course of business. I am aware on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on February 3, 2005, at Beverly Hills, California.

Karen L. Dales

LAW OFFICES OF LEVIN & MARGOLIN
8484 Wilshire Boulevard, Suite 660
Beverly Hills, California 90211-3217
TELEPHONE: 323/653-1850 ~ FACSIMILE: 323/653-1225

Attorneys for MIKYUNG WARNER

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

MIKYUNG WARNER, PETITIONER,
v. GLADWIN GILL, RESPONDENT.

CASE NO. BF023845, NOTICE OF RULING
Date: October 21, 2005, Dept: 27

Gladwin Gill's Motion for Joinder came on regularly for hearing on October 21, 2005, in Dept. 27, the Hon. Mitchell Beckloff, Judge Pro Tem, presiding. Appearing on behalf of moving party, Gladwin Gill, was Leslie Shear and Robert Friedman. Moving party was not present in court. Appearing on behalf of Petitioner Mikyung Warner who was present in court was Lionel P. Levin of Levin & Margolin and Diana Cooper of the Law Offices of Ron Saxman.

The Court, after considering the pleadings and argument of counsel, ruled as follows:

1. *Gladwin Gill's* Motion for Joinder is DENIED, effective forthwith,
2. Petitioner's counsel is ordered to prepare a notice of ruling.
3. Moving party's request for a written statement of reasons from the Court is DENIED.

Dated: October 24, 2005

Respectfully submitted,
Law Offices of LEVIN & MARGOLIN
By: Lionel P. Levin, Attorneys for *Mikyung Warner*

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 8484 Wilshire Boulevard, Suite 660, Beverly Hills, California 90211. On October 24, 2005, I served the foregoing document(s) described as NOTICE OF RULING on the interested parties to this action by placing a true copy thereof in a sealed envelope, postage prepaid, at Beverly Hills, California, in the ordinary course of business, addressed as follows:

Leslie Ellen Shear, Esq.
16830 Ventura Blvd.
Encino, CA 91436-1749

Robert J. Friedman, Esq.
9454 Wilshire Blvd., Suite 500
Beverly Hills, CA 90212-2908

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at Beverly Hills, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on October 24, 2005, at Beverly Hills, California.

Karen L. Dales

Court of Appeal, Second Appellate District, Div. 3
No. B182101

S146841

IN THE SUPREME COURT OF CALIFORNIA

SUPREME COURT
FILED
NOV 29 2006
Frederick K. Ohlrich Clerk
DEPUTY

AMY G., Plaintiff and Appellant,
v.
M. W., Defendant and Respondent;
G. G., Defendant and Appellant.

Petition for review denied.

George
Chief Justice

APPENDIX C

CALIFORNIA FAMILY CODES

§7540

Except as provided in Section 7541, the child of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage. (Am & Ren Stats 1993, C 219)

Family Code §7541

(a) Notwithstanding Section 7540, if the court finds that the conclusions of all the experts, as disclosed by the evidence based on blood tests performed pursuant to Chapter 2 (commencing with Section 7550), are that the husband is not the father of the child, the question of paternity of the husband shall be resolved accordingly.

(b) The notice of motion for blood tests under this section may be filed not later than two years from the child's date of birth by the husband, or for the purposes of establishing paternity by the presumed father or the child through or by the child's guardian ad litem. As used in this subdivision, "presumed father" has the meaning given in Sections 7611 and 7612.

(c) The notice of motion for blood tests under this section may be filed by the mother of the child not later than two years from the child's date of birth if the child's biological father has filed an affidavit with the court acknowledging paternity of the child.

(d) The notice of motion for blood tests pursuant to this section shall be supported by a declaration under oath submitted by the moving party stating the factual basis for placing the issue of paternity before the court.

(e) Subdivision (a) does not apply, and blood tests may not be used to challenge paternity, in any of the following cases:

(1) A case that reached final judgment of paternity on or before September 30, 1980.

(2) A case coming within Section 7613.

APPENDIX D

(3) A case in which the wife, with the consent of the husband, conceived by means of a surgical procedure. (Am Stats 1998, C581)

§7611

A man is presumed to be the natural father of a child if he meets the conditions provided in Chapter 1 (commencing with Section 7540) or Chapter 3 (commencing with Section 7570) of Part 2 or in any of the following subdivisions:

(a) He and the child's natural mother are or have been married to each other and the child is born during the marriage, or within 300 days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce, or after a judgment of separation is entered by a court.

(b) Before the child's birth, he and the child's natural mother have attempted to marry each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and either of the following is true:

(1) If the attempted marriage could be declared invalid only by a court, the child is born during the attempted marriage, or within 300 days after its termination by death, annulment, declaration of invalidity, or divorce.

(2) If the attempted marriage is invalid without a court order, the child is born within 300 days after the termination of cohabitation.

(c) After the child's birth, he and the child's natural mother have married, or attempted to marry, each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and either of the following is true:

(1) With his consent, he is named as the child's father on the child's birth certificate.

(2) He is obligated to support the child under a written voluntary promise or by court order.

(d) He receives the child into his home and openly holds out the child as his natural child.

(e) If the child was born and resides in a nation with which the United States engages in an Orderly Departure Program or successor program, he acknowledges that he is the child's father in a declaration under penalty of perjury, as specified in Section 2015.5 of the Code of Civil Procedure. This subdivision shall remain in effect only until January 1, 1997, and on that date shall become inoperative.

(f) The child is in utero after the death of the decedent and the conditions set forth in Section 249.5 of the Probate Code are satisfied. (Am Stats 2004, C775)

§7611.5

Where Section 7611 does not apply, a man shall not be presumed to be the natural father of a child if either of the following is true:

(a) The child was conceived as a result of an act in violation of Section 261 of the Penal Code and the father was convicted of that violation.

(b) The child was conceived as a result of an act in violation of Section 261.5 of the Penal Code, the father was convicted of that violation, and the mother was under the age of 15 years and the father was 21 years of age or older at the time of conception. (Ad Stats 1993, C 219)

§7612

(a) Except as provided in Chapter 1 (commencing with Section 7540) and Chapter 3 (commencing with Section 7570) of Part 2 or in Section 20102, a presumption under Section 7611 is a rebuttable presumption affecting the burden of proof and may be rebutted in an appropriate action only by clear and convincing evidence.

(b) If two or more presumptions arise under Section 7611 which conflict with each other, the presumption which on the facts is founded on the weightier considerations of policy and logic controls.

(c) The presumption under Section 7611 is rebutted by a judgment establishing paternity of the child by another man. (Am Stats 1994, C1269, s54)

[NOTE: Family Code §20102 was repealed in 1993.]

§7635

(a) The child may, if under the age of 12 years, and shall, if 12 years of age or older, be made a party to the action. If the child is a minor and a party to the action, the child shall be represented by a guardian ad litem appointed by the court. The guardian ad litem need not be represented by counsel if the guardian ad litem is a relative of the child.

(b) The natural mother, each man presumed to be the father under Section 7611, and each man alleged to be the natural father, may be made parties and shall be given notice of the action in the manner prescribed in Section 7666 and an opportunity to be heard.

(c) The court may align the parties.

(d) In any initial or subsequent proceeding under this chapter where custody of, or visitation with, a minor child is in issue, the court may, if it determines it would be in the best interest of the minor child, appoint private counsel to represent the interests of the minor child pursuant to Chapter 10 (commencing with Section 3150) of Part 2 of Division 8. (Am Stats 1994, C1269)

§7650

(a) Any interested person may bring an action to determine the existence or nonexistence of a mother and child relationship. Insofar as practicable, the provisions of this part applicable to the father and child relationship apply.

(b) A woman is presumed to be the natural mother of a child if the child is in utero after the death of the decedent and the conditions set forth in Section 249.5 of the Probate Code are satisfied. (Am Stats 2004, C775)